MOTION FILED
AUG 17 1982

No. 82-131

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION
owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,
Petitioner

v.

HOWARD E. PFEIFER,
Respondent

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN T. BIEZUP
MICHAEL D. BROPHY
PALMER BIEZUP & HENDERSON
Suite 956, Public Ledger Building
Philadelphia, Pennsylvania 19106
(215) 625-9900
Attorneys for Amici Curiae

Richard W. Palmer
Edward T. Connelly
OF COUNSEL

THE LEGAL INTELLIGENCER, 10TH AND SPRING GARDEN STREETS, PHILA., PA 19123 (215) 236-2000

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Keystone Shipping Company, Puerto Rico Marine Management, Inc., Sea-Land Service, Inc. and Sun Transport, Inc. hereby respectfully move for leave to file the attached brief amici curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of amici curiae in this case arises from their ownership and operation of numerous vessels engaged in interstate commerce and their exposure to personal injury actions subject to the rule of damages announced in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982). The interests of amici curiae may not be represented properly before this Court due to the limited involvement of the petitioner and respondent in interstate commerce. By reason of their familiarity with the maritime law of the several federal jurisdictions through which the vessels of Keystone Shipping Company, Puerto Rico Marine Management, Inc., Sea-Land Service, Inc. and Sun Transport, Inc. pass in interstate commerce, amici curiae are qualified to present to this Court a thorough exposition of the far-reaching effects of the *Pfeifer* decision.

WHEREFORE, Keystone Shipping Company, Puerto Rico Marine Management, Inc., Sea-Land Service, Inc. and Sun Transport, Inc. respectfully request leave of this Court to file the attached brief amicus curiae.

PALMER BIEZUP & HENDERSON

By:_____

John T. Biezup
Michael D. Brophy
Palmer Biezup & Henderson
Suite 956,
Public Ledger Building
Philadelphia, PA 19106
(215) 625-9900
Counsel for Amici Curiae

Richard W. Palmer
Edward T. Connelly
OF COUNSEL

No. 82-131

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION
owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,
Petitioner

v.

HOWARD E. PFEIFER,
Respondent

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN T. BIEZUP
MICHAEL D. BROPHY
PALMER BIEZUP & HENDERSON
Suite 956, Public Ledger Building
Philadelphia, Pennsylvania 19106
(215) 625-9900
Attorneys for Amici Curiae

Richard W. Palmer
Edward T. Connelly
OF COUNSEL

TABLE OF CONTENTS

Table of Authorities ii

Interest of Amici Curiae vii

Summary of Argument viii

Argument 1

Conclusion 11

TABLE OF AUTHORITIES

CASES

Alaska Airlines, Inc. v. Sweat, 568 P.2d 916 (Alaska 1977) 8

Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), *reh'g denied*, 412 U.S. 933 (1973) 9

Beanland v. Chicago, Rock Island and Pacific Railroad Co., 480 F.2d 109, 114-15 (8th Cir. 1973) 4

Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967) 7,8

Blue v. Western Railway of Alabama, 469 F.2d 487, 496 (5th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973) 3

Byrd v. Reederei, 638 F.2d 1300 (5th Cir., Unit B 1981), *reh'g en banc granted*, 650 F.2d 1324 (5th Cir., Unit B 1981) 5,10

Chesapeake & Ohio Railway Co. v. Kelly, 241 U.S. 485 (1916) 2,3,4,5,6,9

Chiarello v. Domenico Bus Service, 542 F.2d 883, 886-87 (2d Cir. 1976) 3

Cooley v. Board of Port Wardens, 53 U.S. (12 How.) 299 (1851) 9

Culver v. Slater Boat Co., 644 F.2d 460 (5th Cir., Unit A 1981) 5,10

Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981) 4,6

Foremost Insurance Co. v. Pansy F. Richardson, ____ U.S. ____, 102 S.Ct. 2654 (1982) . 1

Freeman v. Lanning Corporation, 233 N.W.2d 68 (Mich.Ct.App. 1975) 7

TABLE OF AUTHORITIES — (Continued)

Fuhrman v. Reading Co., 439 F.2d 10, 14-15 (3rd Cir. 1971) 3

Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116, 129 (3d Cir. 1979), *vacated*, 451 U.S. 965 (1981) 5

Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) 9

Ivy v. Security Barge Lines, Inc., 585 F.2d 732 (5th Cir. 1978), *modified on different grounds*, 606 F.2d, 524, 529 (5th Cir. 1979), *cert. denied*, 446 U.S., 956 (1980) 3

J. Ray McDermott & Co. v. M/V MORNING STAR, 431 F.2d 714 (5th Cir. 1970), *reh'g*, 457 F.2d 815 (5th Cir. 1972), *cert. denied sub nom., Fish Meal Co. v. J. Ray McDermott & Co., Inc.*, 409 U.S. 948 (1972) 5

Johnson v. Penrod Drilling Co., 469 F.2d 897, 904 (5th Cir. 1972), *cert. denied*, 423 U.S. 839 (1975) 3

Johnson v. Serra, 521 F.2d 1289, 1295-96 (8th Cir. 1975), *cert. denied*, 419 U.S. 998 (1974) 5

Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) 5,6,7

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 156 (1920) 2

Mascuilli v. United States, 411 F.2d 867 (3d Cir. 1969) 9

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 1

Murphy v. National Railroad Passenger Corp., 547 F.2d 816, 818 (4th Cir. 1977) 3

TABLE OF AUTHORITIES — (Continued)

M/V TUNGUS v. Skovgard, 358 U.S. 588, 601-602, 608-611 (1959) (Brennan, J., dissenting) 1

Norfolk & Western Railway Co. v. Liepelt, 444 U.S. 490 (1980), *reh'g denied*, 455 U.S. 972 (1980) 4,5,6,9,10

O'Shea v. Riverway Towing Co., 677 F.2d 1194 (7th Cir. 1982) 4,6,9

Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672 (Minn. 1977) 8

Overstreet v. U.S., 528 F.Supp. 838 (M.D. Ala. 1981) 8

Petition of U.S. Steel Corp., 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971), *reh'g denied*, 403 U.S. 924 (1971) .. 3

Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453 (3d Cir. 1982) 2,5,6,7,8,9

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 1,2

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) 9

Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974) 8

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 596, 601 (1974), (Powell, J., dissenting), *reh'g denied*, 415 U.S. 986 (1974) 2

Southern Pacific Co. v. Jensen, 244 U.S. 205, 215-16 (1917) 2

The LOTTAWANNA, 88 U.S. (21 Wall.) 558 (1874) 1

TABLE OF AUTHORITIES — (Continued)

United States v. English, 521 F.2d 63 (9th Cir. 1975) 4

Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310, 319, 322 (1955) 9

Yodice v. Koninklijhe Nederlandsche Stoomboot Maatschappij, 443 F.2d 76, 77-78 (2d Cir. 1971), *cert. denied*, 411 U.S. 933 (1973) ... 3

STATUTES:

Federal Employers Liability Act, 45 U.S.C. §51 *et seq.* 2,3

Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq.* 3

Jones Act 46 U.S.C. §§688 *et seq.* 3

Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. §901 *et seq.* 3,8,9

OTHER AUTHORITIES:

J. Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D.L.Rev. 307, 309 (1975) 6

I. Fisher, *The Theory of Interest*, 43 (1930); 6

R. Posner, *Economic Analysis of Law*, 78-79 (1973) 6

INTEREST OF THE AMICI CURIAE

Amici Curiae, Keystone Shipping Company, Puerto Rico Marine Management, Inc., Sea-Land Service, Inc. and Sun Transport, Inc. are United States flag shipowners and operators whose vessels represent a substantial portion of the United States merchant fleet. Amici Curiae represent the interests of vessel owners and operators who, because of their extensive involvement in interstate and foreign commerce, are directly affected by the decision of the United States Third Circuit Court of Appeals in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982), as well as by decisions of other United States Courts of Appeal which are inconsistent with *Pfeifer*. Because of their relatively limited connection with maritime commerce, neither Petitioner nor Respondent can adequately protect the interests of the Amici. Therefore, Amici respectfully request leave to appear in this Court as amici curiae.

SUMMARY OF ARGUMENT

The decision in *Pfeifer, supra,* a longshoreman's personal injury action, to adopt the total offset method of accounting for the effect of inflationary pressures on future earning capacity by rejecting the time honored process of discounting awards to present value and adopting a rule which "offsets" inflation is inconsistent with express holdings of this Supreme Court as well as with those of other Courts of Appeal. See *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490, *reh'g denied,* 445 U.S. 972 (1980); *Chesapeake & Ohio Ry. Co. v. Kelly,* 241 U.S. 485 (1916). Moreover, *Pfeifer, supra,* undermines the principles of federalism and uniformity which have remained the cornerstones of federal maritime jurisprudence in that it adopts a state rule of decision contrary to established maritime law in a maritime personal injury action. Differing approaches to the problem of forecasting the effect of inflation on future wages in maritime personal injury and death cases has created a conflict among the United States Circuit Courts of Appeal and the Appellate Courts of the several states.

The *Pfeifer* decision regarding the effects of inflation on computation of awards for lost wages subjects vessel operators to different liabilities depending on which United States ports and states they serve. The requirement of uniformity in United States Maritime law demands that this Honorable Court grant the petition of Jones & Laughlin Steel Corp. for writs certiorari.

IN ALL CASES ARISING UNDER THE LONGSHOREMENS AND HARBOR WORKER'S COMPENSATION ACT, DAMAGES MUST BE DETERMINED PURSUANT TO A UNIFORM FEDERAL STANDARD WHICH REQUIRES THAT A LUMP SUM AWARD FOR LOST FUTURE EARNINGS BE REDUCED TO PRESENT VALUE UNDER THE RULE OF CHESAPEAKE & OHIO RAILWAY V. KELLY, 241 U.S. 485 (1916)

This Court has long recognized that the maritime law of the United States must be uniform throughout the nation since the framers of our Constitution aimed at uniformity and consistency "on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." THE LOTTAWANNA, 88 U.S. (21 Wall.) 558 (1874). Recently, this Court reaffirmed that the duties and obligations of vessel owners and operators should not differ when they navigate within the territorial jurisdictions of the several States. *Foremost Insurance Co. v. Pansy F. Richardson*, ____ U.S. ____, 102 S.Ct. 2654 (1982). It is only when all vessel operators, no matter which ports of this country they serve, are subject to the same duties and liabilities, that the smooth flow of maritime commerce is served. *Id.* Since the United States Courts of Appeal have split in their treatment of the effects of changes in general price levels vis-a-vis computations of awards for future wage loss in maritime personal injury and death cases, this Court should grant certiorari to resolve the conflict among the varying approaches.

Particularly in the area of liabilities for maritime personal injury and death claims, this Court has stressed the need for a uniform body of federal law. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); M/V TUNGUS *v. Skovgard*, 358 U.S. 588, 601-02, 608-611 (1959) (Brennan, J., dissenting); *Pope & Talbot, Inc. v.*

Hawn, 346 U.S. 406 (1953); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215-16 (1917). *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 596, 601 (1974) (Powell, J., dissenting), *reh'g denied*, 415 U.S. 986 (1974).

In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), the Court declined to give effect to a Congressional enactment "saving . . . to claimants the rights and remedies under the workmens' compensation law of any State." *Id.* at 156. The Court rejected a compensation scheme that subjected maritime employers to inconsistent liabilities depending on where they happened to do business. The rationale underlying the *Knickerbocker* decision applies with equal force to the case at bar.

The Third Circuit Court of Appeals decision in the case of *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982) has deepened the conflicts among the U.S. Circuit Courts of Appeal concerning calculation of awards for future wage loss and will subject vessel operators to inconsistent liabilities depending on where in the United States they happen to trade, or if they are amenable to service of process in several judicial districts.

The method of calculating damages in maritime personal injury cases is controlled by the uniform rule established by this Court in *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485 (1916), a wrongful death action under the Federal Employer's Liability Act, 45 U.S.C. §51 *et seq.* (FELA). The Court ruled that damages in such an action "should be equivalent to compensation for the deprivation of pecuniary benefits that would have resulted from the continued life of the deceased." *Id.* at 489. With respect to an award for future wage loss, the Court held that it is an economic fact of life that a sum of money in hand is worth more than a like sum paid out over time, and, that in view of the fact that a party seeking to recover damages must act reasonably to limit the amount of damages he sustains, awards

for future losses should be discounted to reflect the interest that might reasonably be earned over time in safe investments by one with no particular knowledge or skill in financial matters. *Id.* at 489-90.

This Court in *Kelly* expressly refused to lay down a precise formula for application of a discount rate. *Id.* at 491. The Court suggested that expert testimony or evidence in the form of standard interest and annuity tables would provide a basis for determining the proper discount rate to be applied. *Id.*

In 1971, Chief Judge Friendly wrote that the requirement of discounting future losses to present value was in line with so many "familiar and controlling decisions" that extended citation in support of it became "supererogatory"; *Yodice v. Koninklijhe Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76, 77-78 (2d Cir. 1971), *cert. denied*, 411 U.S. 933 (1973). In the 1970's, as in years past, *Kelly, supra*, was routinely cited throughout the circuits as the general rule for cases arising under the FELA, the Jones Act, 46 U.S.C. §688, the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. §§901 *et seq.* ("LHWCA"), and even the Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq.* ("FTCA"). *Chiarello v. Domenico Bus Service*, 542 F.2d 883, 886-87 (2nd Cir. 1976); *Yodice, supra*, at 79 (LHWCA); *Fuhrman v. Reading Co.*, 439 F.2d 10, 14-15 (3d Cir. 1971) (FELA); *Murphy v. National Railroad Passenger Corp.*, 547 F.2d 816, 818 (4th Cir. 1977) (FELA); *Ivy v. Security Barge Lines*, 585 F.2d 732 (5th Cir. 1978), *modified on different grounds*, 606 F.2d 524, 529 (5th Cir. 1979), *cert. denied*, 446 U.S. 956 (1980) (Jones Act); *Blue v. Western Ry. Co. of Alabama*, 469 F.2d 487, 496 (5th Cir. 1972) *cert. denied*, 410 U.S. 956 (1973) (FELA); *Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 904 (5th Cir. 1972) *cert. denied*, 423 U.S. 839 (1975) (Jones Act); *Petition of U.S. Steel*, 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971), *reh'g denied*, 403 U.S. 924 (1971) (Jones Act);

Beanland v. Chicago, Rock Island and Pacific RR. Co., 480 F.2d. 109, 114-15 (8th Cir. 1973) (FELA); *United States v. English*, 521 F.2d 63, 72 (9th Cir. 1975) (FTCA).

In 1980, this Court reaffirmed the continuing vitality of the rule in *Kelly, supra*, i.e., that the measure of recovery in cases controlled by federal law is "the damages that flow from the deprivation of the pecuniary benefits" which the injured parties might reasonably have received. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980), *reh'g denied*, 445 U.S. 972 (1980). The specific holding under the facts in *Liepelt* was that under this federal standard, evidence of tax payable on a decedent's past and future earnings was relevant to the calculation of "pecuniary benefits which the beneficiaries might have reasonably received" and that consideration of tax liability in computing a net loss to plaintiff was not so speculative as to render competent evidence inadmissible. 444 U.S. at 494. The Court mentioned that considerations of future economic trends, like prediction of tax liabilities and even the future course of a plaintiff 's health, are matters involving prediction and estimation but that the bench and bar have developed effective methods of presenting the essential elements of expert calculations in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. *Id.* at 494.

With respect to consideration of the effects of inflation on an injured party's future earning capacity in computing a damage award under federal law, several of the Circuits have followed the approach of *Kelly, supra*, and *Liepelt, supra*, in considering competent evidence of the effect of inflation on a claimant's future earning capacity. *See, e.g. United States v. English*, 521 F.2d 63, 72 (9th Cir. 1975); *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980) *cert. denied*, 451 U.S. 971 (1981); *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982). Other Circuits, while

recognizing that *Kelly, supra,* and its progeny require that future wage losses be discounted to present value, follow the traditional rule that evidence of future inflationary trends is too speculative to provide a reasonable factual basis for consideration of the potential effect of future inflation rates on earning capacity. *Culver v. Slater Boat Co.*, 644 F.2d 460 (5th Cir., Unit A, 1981); *Byrd v. Reederei*, 638 F.2d 1300 (5th Cir., Unit B, 1981), *rehearing en banc granted*, 650 F.2d 1324 (5th Cir., Unit B, 1981) (LHWCA — declining to include the effects of future inflation in assessing damages on the grounds that the foregoing language quoted from *Liepelt*, 444 U.S. at 494, was only dicta and that prior Fifth Circuit precedent controlled the decision [citing *Johnson v. Penrod Drilling Co., supra.*]).

In all of the foregoing cases, the doctrine requiring a reduction in future earnings to present value has consistently been followed. However, in the *Pfeifer* case, the Third Circuit Court of Appeals departed from this doctrine and "borrowed" the law of Pennsylvania as most recently pronounced by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980). The Court below clearly erred in adopting the law of the Commonwealth of Pennsylvania to supply the method of computation of damage awards for future lost wages in maritime personal injury cases in light of the established federal standard of computation embodied in *Norfolk & Western Railway Co. v. Liepelt, supra; Chesapeake & Ohio Railway Co. v. Kelly, supra. See Griffith v. Wheeling Pittsburgh Steel Corp.*, 610 F.2d 116, 129 (3d Cir. 1979), *vacated*, 451 U.S. 965 (1981); *J. Ray McDermott & Co. v. M/V MORNING STAR*, 431 F.2d 714 (5th Cir. 1970), *reh'g*, 457 F.2d 815 (5th Cir. 1972), *cert. denied sub nom., Fish Meal Co. v. J. Ray McDermott & Co.*, 409 U.S. 948 (1972).

Not only has *Pfeifer v. Jones & Laughlin Steel Corp., supra*, effectively removed from consideration the well-settled principle of discounting damages to present

value, but also the Third Circuit has done so by improperly adopting state law to govern an important issue of federal law in contravention of an established federal rule. The *Pfeifer* decision is an ill-advised attempt to facilitate calculation of damages in federal courts while undermining important uniform principles of federal law clearly stated in the *Kelly* and *Liepelt* decisions.

While the *Pfeifer* court "bid fealty" to the concept of reducing future earnings to present worth, 678 F.2d at 461, the "total offset method" adopted by the court under the Pennsylvania case of *Kaczkowski v. Bolubasz*, *supra*, cannot be meaningfully reconciled with *Kelly's* emphasis upon the earning power of money presently received. This analysis is supported by the Seventh Circuit's decision in *O'Shea v. Riverway Towing Company*, 677 F.2d 1194 (7th Cir. 1982), decided 11 days after *Pfeifer*. In that case, Judge Posner took judicial notice of the so-called "Fisher effect," which predicts that, while the "real" rate of interest remains constant, the nominal rate rises proportionally in response to the pressures of inflation. *See* I. Fisher, *The Theory of Interest*, 43 (1930); R. Posner, *Economic Analysis of Law*, 78-79 (1973). In light of this analysis, Judge Posner concluded that to utilize the current interest rate as a discount rate would serve, in effect, to deduct an inflation penalty from a claimant's recovery, since that rate would compromise a certain allowance for current inflation, 677 F.2d at 1200. The proper method of discounting would involve a reasonable approximation of the real rate of interest. *Id; Doca v. Marina Mercante Nicaraguense*, 634 F.2d 30 (2d Cir. 1980), *cert denied*, 451 U.S. 971 (1981). The significance of *Doca's* conclusion that competent evidence of inflation may be considered is its reaffirmation of the holding of *Kelly*, *supra*, decided before inflation became a major economic consideration. *See* J. Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D. L. Rev. 307, 309 (1975).

Pfeifer, supra, is an ill-advised attempt to facilitate calculation of prices and interest rates over time by excluding any evidence and adopting a rule of law (the total offset method) that has no basis in actual economic conditions which may change. *Pfeifer's* approach is destructive of the uniformity of maritime law.

A comparison of the decisions of the several States concerning these economic factors reveals a wide difference of opinion between the *Pfeifer* reasoning on the one hand and that of the other federal district and Circuit courts and other State appellate courts on the other hand. If the federal courts continue to apply the state laws, the results will necessarily be disparate. *Compare Beaulieu v. Elliot,* 434 P.2d 665 (Alaska, 1967); *Kaczkowski, supra; Freeman v. Lanning Corp.,* 233 N.W.2d 68 (Mich.Ct.App. 1975).

Beaulieu v. Elliot, 434 P.2d 665 (Alaska 1967), established the rule under Alaska law that prospective damages would not be subject to a discount factor for calculation of present worth. That Court assumed that future inflation would erode the purchasing power of money in direct proportion to the interest which can be earned on the principal amount. While the Pennsylvania Supreme Court chose in *Kaczkowski, supra,* to adopt the total offset method, other jurisdictions have experienced considerable difficulty in dealing with the role of inflation in damage awards and have reached divergent results. *See generally Kaczkowski, supra,* and cases cited therein.

In *Freeman v. Lanning Corporation,* 233 N.W.2d 68 (Mich. Ct.App. 1975), the Michigan Court of Appeals, noting that a large number of jurisdictions had refused to allow consideration of rising costs in fixing prospective damages, applied a statutory discount rate of six percent. However, the same Court of Appeals four years later held that no reversible error occurred when inflationary factors were considered by an expert computing future loss of wages.

The Iowa Supreme Court in *Schnebly v. Baker*, 217 N.W.2d 708 (Iowa 1974), ruled that evidence of future inflation is admissible in assessing future losses. In that case, plaintiff's expert testified without reservation that the inflation rate equaled the discount rate. However, the Minnesota Supreme Court in *Ossenfort v. Associated Milk Producers, Inc.*, 254 N.W.2d 672 (Minn. 1977), held that while effects of inflation are properly considered in the context of future losses, expert testimony established a net discount rate of one percent and the trial court did not err in permitting the jury to consider the testimony.

In applying Alabama law, the middle district court acknowledged that inflation is a probable component in future damages but only in those cases where an appropriate adjustment has been made for the effect of income tax. (The district court then proceeded to discount future damages by a factor of six percent). *Overstreet v. U.S.*, 528 G. Supp. 838 (M.D. Ala. 1981).

In light of these conflicting results, it should not be surprising that the very court which set forth the total offset method in *Beaulieu v. Elliot, supra,* later questioned the validity of their conclusion that inflation is an automatic offset to the interest which would be earned through investments. *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916 (Alaska 1977).

The significance of the foregoing conflicting results is apparent. If *Pfeifer, supra,* is permitted to stand, the federal courts remain free to adopt from the states different methods of calculating damages in cases arising under the LHWCA. This does violence to traditional notions of uniformity in federal maritime law.

Computation of damages in an action under Section 33 of the LHWCA is peculiarly federal in character. No significant local concern exists as a required rationale for a federal court's adoption in the context of an LHWCA case of the law of the forum state or the law of the place of the injury. The federal rule of decision

should be applied. *Compare Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851). Unlike the situation presented to the Court in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), the locus of the injury in a typical LHWCA case is not analogous to an oil rig permanently moored off the coast of a particular state to the oil field there. Rather the locus of an injury in an LHWCA case is a vessel in the traditional maritime context which moves from port to port throughout the United States.

Resolution of this case can be accomplished according to federal maritime law as previously developed by this Court and does not require development of a new body of federal law. *Compare Wilburn Boat Co. v. Fireman's Insurance Co.*, 348 U.S. 310, 319 (1955). But *See* the concurring opinion of Frankfurter, J., in *Wilburn Boat Co., id.* at 322-4.

The Third Circuit concluded in *Mascuilli v. United States*, 411 F.2d 287 (3d Cir. 1969), that an action under the LHWCA was governed by the maritime law, that Pennsylvania law was not controlling, and that the flat discount rate of 6% then mandated by Pennsylvania law should properly give way to the more flexible federal standard enunciated in *Kelly, supra. O'Shea, supra*, remains faithful to this flexible standard, but the *Pfeifer* decision seeks to replace that standard with precisely the same sort of rigid state standard rejected in *Mascuilli, supra*. In so doing, the *Pfeifer* court has abandoned *Kelly* and *Liepelt, supra*, as well as the flexible approach to the problem of lost future earnings which permitted the finder of fact to hear evidence to determine the proper measure of damages. Because the *Pfeifer* approach is not authorized by *Kelly, supra*, or its progeny, and because it further erodes the uniformity so important in maritime law, Amici submit that resolution by this Court of this inconsistency is urgently required.

To the extent that this Court's decision in *Norfolk and Western Railroad Company v. Liepelt, supra*, discusses the application of an inflation factor in calculating damages for future wage losses in maritime personal injury and death cases, Amici submit that the foregoing case provides a method for applying the inflation factor consistent with federal maritime law. The Fifth Circuit Court of Appeals in the cases of *Culver v. Slater Boat Company*, 644 F.2d 460 (5th Cir., Unit A, 1981) and *Byrd v. Reedreri*, 638 F.2d 1300 (5th Cir., Unit B, 1981) have held that *Liepelt* does not require that inflation be considered as a factor in assessing damages for future wage losses in maritime cases.

In *Liepelt*, this Court suggested that inflation could be one factor among others to be considered by a jury upon presentation of proper proof in a determination of future wage losses. *Id.*, p. 494. This Court further stated that "Any one of these issues might provide the basis for protacted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life." *Id.*, p. 494.

Upon the foregoing, Amici submit that this Court has stated a federal rule that if inflation is a factor to be considered in determining the quantum of future losses, it must be proven by competent evidence.

In the *Pfeifer* decision, however, the Third Circuit Court of Appeals has fashioned a rule which requires no proof of the effect of future inflation but instead presumes that the discount factor is and will be totally offset by inflationary conditions. Amici submit that the foregoing legal presumption adopted by the Third Circuit directly conflicts with this Court's stated preference for proof of all damages, including an inflation factor, by competent evidence. *See also, Michigan Central Railway Company v. Vreeland*, 227 U.S. 59 (1913).

Furthermore, Amici submit that the Third Circuit's substitution of the Pennsylvania State Rule of Damages relating to the computation of future wage losses directly violates this Court's federal rule on this very point as set forth in the *Liepelt* case.

Amici submit that these further inconsistencies between the *Pfeifer* decision and the *Liepelt* decision urgently require resolution by this Court.

CONCLUSION

For the reasons stated in Petitioner's brief and in the arguments advanced by these Amici, we respectfully request that this Court grant the Petition for Certiorari filed by Jones & Laughlin Steel Corporation.

Respectfully submitted,

PALMER BIEZUP & HENDERSON

By: _____

John T. Biezup
Michael D. Brophy
Attorneys for Amici

Richard W. Palmer
Edward T. Connelly
OF COUNSEL